No. 71-1047

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

SILAS WALLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

SILAS WALLER,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

The petitioner, SILAS WALLER, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated January 31, 1969, reversed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. That opinion of the Court of Appeals, 422 F.2d 1202 (7th Cir., 1969) is reprinted as Appendix "A", *infra.* On February 14, 1969, the United States filed a Motion to extend the time in which to file a Petition for Rehearing to March 7, 1969, and that Motion was granted. The United States did not, in fact, file a Petition for Rehearing. On February 11, 1969, the Government filed a Motion to hold the appeal in abeyance until the determination by the Supreme Court of *U.S.* v. *White,* 401 U.S. 745 (1971). On March 13, 1969, this Motion of the United States to hold the appeal in abeyance was denied by the United States Court of Appeals for the Seventh Circuit. On March 26, 1969, the United States filed a second Motion to hold the appeal in abeyance pending *U.S.* v. *White, supra,* or, in the alternative, for a rehearing, and this Motion was granted on April 14, 1969. On December 7, 1971, the United States, some eight months after the Supreme Court's decision in *U.S.* v. *White,* 401 U.S. 745 (1971), moved for the entry of an Order vacating the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 31, 1969, reversing and remanding the conviction and for the entry of an Order affirming the conviction, and on December 8, 1971, this Motion was granted. This Judgment Order is reprinted as Appendix "B", *infra.* On December 16, 1971, the petitioner filed a Motion to vacate the judgment of December 8, 1971 and for a reversal or, in the alternative, for a Petition for Rehearing *En Banc.* On January 21, 1972,

the United States Court of Appeals for the Seventh Circuit denied the petitioner's Motion to vacate or for rehearing *en banc*, but reversed the convictions under the possession Counts II and IV. This Order is reprinted as Appendix "C", *infra*.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit entered on December 8, 1971 affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division. A Motion to vacate the judgment of December 8, 1971 and reverse or, in the alternative, for a Petition for Rehearing *En Banc* was denied. This Petition for a Writ of Certiorari is filed within thirty (30) days of the denial of the Motion to vacate the judgment or, in the alternative, for a Petition for Rehearing *En Banc*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, did the judgment of the Court of Appeals reversing the petitioner's conviction become final when the time of the United States to file a Petition For Rehearing lapsed?

2. Did the trial court err in refusing the standard "missing witness" instruction when the informant whose testimony would have been critical on the issue of identity was present during the trial but failed to appear as a Government witness?

3. Under *Turner* v. *U.S.*, 396 U.S. 398 (1970), did the trial court err in its instructions concerning the effect of possession under Title 21 U.S.C. Section 174, and did these instructions deprive the petitioner of a fair trial on two identical charges of sales of narcotics under Title 18, U.S.C. Section 4705(a)?

RULE 40, FEDERAL RULES OF APPELLATE PROCEDURE

Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court,

a petition for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying.

RULE 41, FEDERAL RULES OF APPELLATE PROCEDURE

Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of mandate.

STATEMENT OF THE CASE

A. Nature of the Case and its Disposition:

This case was commenced by an indictment which was returned against the petitioner. The indictment charged the petitioner with the sale on August 27, 1965 of a narcotic drug, cocaine, not in pursuance of a written order issued by the Secretary of the Treasury in violation of Title 26 U.S.C. Section 4705(a) (Count I); with the sale of the same narcotic drug on the same date of August 27, 1965 after the drug had been imported into the United States contrary to law in violation of Title 21 U.S.C. Section 174 (Count II); the sale on September 16, 1965 of a narcotic drug, cocaine, not in pursuance of a written order issued by the Secretary of the Treasury in violation of Title 26 U.S.C. Section 4705(a) (Count III); and with the sale of the same narcotic drug on the same date of September 16, 1965 after the drug had been imported into the United States contrary to law in violation of Title 21 U.S.C. Section 174 (Count IV).

The petitioner's trial resulted in the jury's verdict of guilty as charged on all four counts of the indictment. Upon the return of the verdict of guilty, petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of twelve years. Notice of appeal on behalf of the petitioner was timely filed.

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated January 31, 1969, reversed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. That opinion of the Court of Appeals, 422 F.2d 1202 (7th Cir., 1969) is reprinted

as Appendix "A", *infra*. On February 14, 1969, the United States filed a Motion to extend the time in which to file a Petition for Rehearing to March 7, 1969, and that Motion was granted. The United States did not, in fact, file a Petition for Rehearing. On February 11, 1969, the Government filed a Motion to hold the appeal in abeyance until the determination by the Supreme Court of *U.S.* v. *White*, 401 U.S. 745 (1971). On March 13, 1969, this Motion of the United States to hold the appeal in abeyance was denied by the United States Court of Appeals for the Seventh Circuit. On March 26, 1969, the United States filed a second Motion to hold the appeal in abeyance pending *U.S.* v. *White, supra*, or, in the alternative, for a rehearing, and this Motion was granted on April 14, 1969. On December 7, 1971, the United States, some eight months after the Supreme Court's decision in *U.S.* v. *White*, 401 U.S. 745 (1971), moved for the entry of an Order vacating the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 31, 1969, reversing and remanding the conviction and for the entry of an Order affirming the conviction, and on December 8, 1971, this Motion was granted. This Judgment Order is reprinted as Appendix "B", *infra*. On December 16, 1971, the petitioner filed a Motion to vacate the judgment of December 8, 1971 and for a reversal or, in the alternative, for a Petition for Rehearing *En Banc*. On January 21, 1972, the United States Court of Appeals for the Seventh Circuit denied the petitioner's Motion to Vacate or for rehearing *en banc*, but reversed the convictions under the possession Counts II and IV. This Order is reprinted as Appendix "C", *infra*. Thereafter, this Petition for Certiorari was timely filed.

B. The Evidence:

(1) Government's Evidence:

The Government's evidence revealed that on August 26, 1965, at approximately 11:00 P.M., Agents Gibson, Pohl and Canaday of the Federal Bureau of Narcotics, met with the informer, James Hartley, in a parking lot at 71st Street and Vincennes Avenue in Chicago. Mr. Hartley was searched and the agents found no money or narcotics on his person or in his vehicle. Agent Pohl strapped a small miniature radio transmitter to Hartley's waist (T. 36-37).

Hartley, with Agent Gibson as a passenger, then drove to the area of the Living Room Lounge located at 744 East 83rd Street in Chicago. Hartley parked on the east side of Evans Street facing south. Agent Gibson gave Hartley $120.00 of official advanced funds. Hartley then got out of the car, walked around the corner, walking east on 83rd Street towards the Living Room Lounge. In about five minutes, Hartley returned to the car (T. 38-39).

At about 12:30 A.M., a man whom Gibson identified as the defendant, Waller, came around the corner and walked up to the window of the driver's side of the car (T. 40). Gibson testified that Waller bent over, looking into the car, and passed Hartley four small aluminum packages which Hartley, in the same motion, passed over to Gibson. The man identified as Waller, then said that Hartley was fortunate because these were the last four packages of "girl" that he had. Gibson testified that he knew the expression "girl" to mean Cocaine (T. 41).

The man identified as Waller, then walked back around the corner to the Living Room Lounge and Hartley drove to a parking lot in the area of 67th Street and the Outer

drive. The usual narcotics bureau procedures of processing the evidence was followed. The aluminum packages were found to contain cocaine.

On September 16, 1965 at 7:30 P.M., the same three agents again met with Hartley at 71st Street and Vincennes Avenue in Chicago. Hartley was searched and the miniature radio transmitter was again fastened to his person (T. 48). Hartley and Gibson again droye to the area of the Living Room Lounge and parked at the corner of Evans and 83rd Street, where Gibson gave Hartley $250.00 of official advanced funds. Hartley got out of the car and walked around the corner towards the Living Room Lounge (Tr. 49). About an hour later at 10:15 P.M., Hartley was seen by Gibson to be walking with a man identified to be Waller, on 83rd Street. They walked past the car in which Gibson was seated and to a gas station on the corner of 83rd Street and Evans. Gibson saw Hartley pass some money to the man identified as Waller and that man counted the money and placed it in his trouser pocket. Both men then walked back towards the Living Room Lounge (Tr. 50-51).

At about 11:00 P.M., Gibson saw Hartley return to the car and give him an aluminum package containing a white powder (T. 51). The usual narcotics bureau procedures of processing the evidence was followed. The package was found to contain cocaine.

Agent Pohl said he observed Silas Waller approaching a tree at the northeast corner of south Ingleside and 83rd Street. Pohl testified that with binoculars he saw Waller place a small package next to the tree. Pohl then said he saw Agent Canaday walk over and look at the package. Hartley returned about fifteen minutes later with an unidentified male negro. This man pointed at the tree and

Hartley walked over to the tree and picked up the package (T. 108). Hartley then returned to the car in which Agent Gibson was seated (T. 109).

The only witness that was relatively close to the man identified as Waller at any time, was Agent Gibson. On both days of both nights in question, Gibson saw a man he identified as the defendant, at 83rd and South Evans. Gibson testified that all businesses at that corner were closed and that the lights of these establishments were off (T. 66). Gibson could not testify as to where the street lights were located in relation to where he had seen the man identified as Waller (T. 66).

An August 26, 1965, the suspect was standing at the driver's window of Hartley's car and therefore, Hartley was between Gibson and the suspect (Tr. 63). When the suspect bent over to the window, there was a shadow from the light when Gibson was looking at the suspect (T. 73).

On September 16, 1965, Gibson was approximately 40 feet away from the suspect (Tr. 69).

(2) Defense Evidence:

The defense presented three witnesses: Mr. Ted C. Frome, Mr. George L. Lindford and Mr. Roy Blackburne. Mr. Frome was an attorney in the State of Wyoming, a rancher engaged in the raising of cattle and was engaged in the business of outfitting big game hunters in the State of Wyoming. Mr. Lindford was a mechanic and also a hunting guide in the employ of Mr. Frome.

Through the testimony of Mr. Frome and Mr. Lindford, it was established that pursuant to advanced reservations, the defendant, Silar Waller, Mr. Roy Blackburne and two other men arrived in Afton, Wyoming, on Saturday, September 18, 1965, to engage in big game hunting. Mr.

Lindford saw them at approximately 2:30 P.M. or 3:00 P.M., on that date in Afton (Tr. 54). The four men hunted in Afton from September 19, 1965 through September 23, 1965. The defendant stayed at the Coral Motel in Afton, Wyoming (Tr. 215).

Mr. Blackburne is the owner of the Nightcap Lounge. He testified that approximately noon on Thursday, September 16, 1965, he, the defendant and two other men left for a hunting trip in Afton, Wyoming (T. 270). This was approximately twelve hours before the alleged sale of narcotics in the early morning of September 17, 1965. Blackburne further testified that the party arrived in Afton, Wyoming at approximately noon on September 18, 1965 (Tr. 272). Blackburne testified that in addition to the ordinary reasons for stopping on a trip, such as, meals and obtaining of gas, there were three primary reasons for delay in the trip from Chicago to Afton, Wyoming. First, the party lost its way twice during the trip; secondly, the car developed transmission trouble and thirdly, there was a heavy snow storm in Wyoming (T. 74-77).

Through documented evidence from the United States Weather Bureau, the defense proved that approximately 23 inches of snow fell in Wyoming on September 16, 1965 and September 17, 1965 (Tr. 293). Mr. Frome testified as to the difficult travelling conditions because of snow on these particular dates (Tr. 226, 229-31). Mr. Lindford also confirmed the fact of the snow storm (T. 259). It is 1450 miles from Chicago to Afton (A. 265).

Government Rebuttal Evidence:

The government in rebuttal through the testimony of a Mr. Doody, established that a Wesley Waller, who had the address of 3636 Calumet Avenue, took out a car loan on

a 1964 Ford Beige Station Wagon with the serial number 4G 72X 195358. Agent Pohl was recalled to the stand and testified that on September 30, 1965, he arrested the defendant in a 1964 beige colored Ford Station Wagon and that its license plate number was NF 1798. He further testified that he had seen this car on September 16, 1965 at Cottage Grove and 83rd Street, at about 10:30 P.M. (T. 336-38). He testified that he examined the identification number at the time of arrest and that it was 4G 72X 195358.

REASONS FOR GRANTING THE WRIT

PURSUANT TO RULE 41 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE JUDGMENT OF THE COURT OF APPEALS REVERSING THE PETITIONER'S CONVICTION BECAME FINAL WHEN THE TIME OF THE UNITED STATES TO FILE A PETITION FOR REHEARING LAPSED.

On January 31, 1969, the Court of Appeals entered its judgment and opinion reversing the conviction of the appellant. On February 14, 1969, the United States filed a motion to extend the time in which to file a Petition for Rehearing to March 7, 1969, and that motion was granted. However, the United States did not, in fact, file a Petition for Rehearing. On February 11, 1969, the Government filed a motion to hold the appeal in abeyance pending determination by the Supreme Court of *U.S.* v. *White,* 401 U.S. 745 (1971). This motion was denied on March 13, 1969. On March 26, 1969, the Government filed a second motion to hold the appeal in abeyance pending *U.S.* v. *White,* 401 U.S. 745 (1971) or, in the alternative, for a rehearing, and this Motion was granted on April 14, 1969. On April 5, 1971, the Supreme Court decided *U.S.* v. *White,* 401 U.S. 745 (1971).

Rule 41 of the Federal Rules of Appellate Procedure provides that "a mandate of the Court *shall* issue twenty-one days after the entry of judgment." The Rule further provides that "a timely filing of a Petition for rehearing will stay the mandate until disposition of the Petition unless otherwise ordered by the Court." The period in which the United States could file its Petition for Rehearing lapsed on March 7, 1969. No Petition for Rehearing was filed. On March 13, 1969, the only other pending mo-

tion of the Government was denied. The mandatory provisions of Rule 41 required the Court of Appeals to issue its mandate reversing the conviction at that time. The Court of Appeals was, therefore, without jurisdiction to issue its Order of April 14, 1969 holding the appeal in abeyance pending determination of *U.S.* v. *White*, 401 U.S. 745 (1971).

In *Iverson* v. *Commissioner of Internal Revenue*, 257 F.2d 409 (8th Cir., 1958) in denying leave to file an untimely Petition for Rehearing, the Court stated:

> "We also believe that leave to file petition for rehearing should be denied. With the mandates on the judgments here involved outstanding, it is doubtful whether this court would have jurisdiction to consider a petition for rehearing. . . . The only reason assigned for the late filing of the petition is the taxpayers' contention that the Supreme Court, in Colony, Inc. v. Commissioner of Internal Revenue, 357 U.S. 28, 78 S.Ct. 1033, 2 L.Ed. 2d 1119, decided an issue pertinent to this appeal favorably to them. . . . The appellate rules are designed to bring about an orderly and prompt termination of litigation. . . . We believe that the time granted for filing petitions for rehearing by our rules is reasonable and that it should be adhered to, and that any substantial departure from the time fixed by the rule would lead to hopeless confusion."

See also *Hines* v. *Royal Indemnity Company*, 253 F.2d 111 (6th Cir., 1958).

At no time has the United States offered a reason for their failure to file a Petition for Rehearing in this case. Further, the Order of April 14, 1969 only held the appeal in abeyance until *White* was decided. *White* was in fact decided on April 5, 1971, resolving the only issue that was similar in the *White* and *Waller* cases. However, the United States took no action on this appeal from April 5, 1971

until December 7, 1971, some eight months later. Therefore, under Rule 41 of the Federal Rules of Appellate Procedure, the judgment reversing the appellant's conviction on January 31, 1969 became final.

THE TRIAL COURT ERRED IN REFUSING THE STANDARD "MISSING WITNESS" INSTRUCTION WHEN THE INFORMANT WHOSE TESTIMONY WOULD HAVE BEEN CRITICAL ON THE ISSUE OF IDENTITY WAS PRESENT DURING THE TRIAL BUT FAILED TO APPEAR AS A GOVERNMENT WITNESS.

The Government informant, Hartley, was the purchaser of the cocaine on both sales charged in the indictment. Hartley's testimony was critical on the issue of identity since he had known the defendant WALLER in the past and since the Agent witnesses were not in a good position to observe the man they identified as the petitioner WALLER. Hartley was present during the course of the trial. Hartley refused to talk with defense counsel without having the prosecutor and Agent Pohl present during any questioning, and he then refused to tell defense counsel anything about the alleged events until called to the stand as a witness (Tr. 6-7, 202). The defense tendered the standard instruction of Judge Labuy which provided as follows:

> "If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party. *However, no such presumption should be drawn by the jury where the witness is equally available to both parties, or where the witness's testimony would be merely cumulative.*" (Emphasis added)

The defense, therefore, was not seeking to have the jury instructed by the Court that Hartley's testimony should be considered to be unfavorable to the Government, but was merely requesting an instruction that would put the issue before the jury for their determination.

In *United States* v. *Restaino*, 369 F.2d 544 (3rd Cir., 1966), the Third Circuit adopted the *McCormick* statement concerning under what circumstances a defendant was entitled to an instruction that the testimony of witnesses, if produced, would have been unfavorable to the Government. The Court stated, at Page 547:

> "* * * [W]hen [1] a potential witness is available, and [2] appears to have special information relevant to the case, so that [3] his testimony would not merely be cumulative and [4] where his relationship with one of the parties is such that the witness would ordinarily be expected to favor him, then if [5] such party does not produce his testimony, the inference arises that it would have been unfavorable." McCormick, Evidence Section 249 at 534.

See also *U.S.* v. *Jackson*, 257 F.2d 41 (3rd Cir., 1958), where the Court reversed the trial court's refusal to allow defendant's counsel to comment on the fact that the Government did not call the informant as a witness. If a defense counsel can comment upon this fact in final argument, the trial judge should not reject a defendant's proposed instruction to the same effect. See *U.S.* v. *Restaino*, 369 F.2d 544 (3rd Cir., 1966).

The trial court erred in refusing the defendant's proposed instruction here, where the Government did not produce as a witness the informant who was clearly available to testify and whose testimony was necessary and unique on an essential element of the offense, identity.

UNDER TURNER V. U.S., 396 U.S. 398 (1970), THE TRIAL COURT ERRED IN ITS INSTRUCTIONS CONCERNING THE EFFECT OF POSSESSION UNDER TITLE 21, U.S.C. SECTION 174, AND THESE INSTRUCTIONS DEPRIVED THE PETITIONER OF A FAIR TRIAL ON TWO IDENTICAL CHARGES OF SALES OF NARCOTICS UNDER TITLE 18 U.S.C. SECTION 4705(a).

The petitioner was convicted on four counts and sentenced to twelve years in custody. Counts 2 and 4 involved violations of Title 21, Section 174; that is, the sale of cocaine after it had been imported and brought into the United States contrary to law. At the trial, the trial court instructed the jury concerning the presumption of unlawful importation and its effect on finding the presumption of unlawful importation and its effect on finding of guilty (Tr. 402-403). In *Turner* v. *U.S.*, 396 U.S. 398 (1970), the Supreme Court held that this presumption was constitutionally valid. The Court of Appeals, in its final Order, reversed the judgments under Counts II and IV and remanded with instructions to vacate the sentences thereunder (Appendix "C", *infra*).

On Counts I and III, petitioner was convicted on the identical sales of cocaine as in Counts II and IV. However, these counts charged violations of Title 26, Section 4705(a), U.S.C. These two sales were alleged to have occurred not in pursuance of a written order form issued by the Secretary of the Treasury.

The jury could not have separated the different counts of sale when they were instructed with the constitutionally invalid instruction that if they found the defendant to be in possession of the cocaine, they were authorized to convict the appellant for sale of cocaine. Under these cir-

cumstances, the appellant is entitled to a new trial on the two counts involving Title 26, Section 4705(a), (*U.S.* v. *Stevenson*, 409 F.2d 354 [7th Cir.; 1969]).

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

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Attorney for petitioner.

APPENDIX

APPENDIX

APPENDIX

APPENDIX "A"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Silas WALLER, Defendant-Appellant.

No. 16426.

United States Court of Appeals
Seventh Circuit.

Jan. 31, 1969.

Prosecution for narcotic violations. The United States District Court for the Northern District of Illinois, Eastern Division, Richard B. Austin, J., entered a judgment of conviction, and the defendant appealed. The Court of Appeals, Per Curiam, held that testimony of narcotics agent relating to conversation between defendant and government's informant that agent picked up on his radio receiver from miniature radio transmitter worn by informer violated defendant's Fourth Amendment rights.

Reversed and remanded.

1. Criminal Law—394.3

Testimony of narcotics agent relating to conversation between defendant and Government's informer that agent picked up on his radio receiver from miniature radio transmitter worn by informer violated defendant's Fourth Amendment rights. 26 U.S.C.A. (I.R.C. 1954) § 4705(a);

Narcotic Drugs Import and Export Act, § 2(c, f), 21 U.S.C.A. § 174; U.S.C.A.Const. Amend. 4.

2. Criminal Law—788

Record in narcotics prosecution failed to show that Government's informer was peculiarly within power of Government to call as to require giving of defendant's requested instruction relating to unfavorable presumption arising from failure to call witness.

3. Criminal Law—665(4)

Trial court did not abuse its discretion in permitting narcotics agent to give rebuttal testimony despite his earlier presence in courtroom, where such testimony concerned license number and registration of automobile supposedly driven by defendant while he claimed to be elsewhere and was based on agent's notes rather than on what he heard during trial.

Raymond J. Smith, Chicago, Ill., for defendant-appellant.

Thomas A. Foran, U. S. Atty., Richard A. Makarski, John Peter Lulinski, Asst. U. S. Attys., Chicago, Ill., for plaintiff-appellee; Gerald M. Werksman, Asst. U. S. Atty., of counsel.

Before HASTINGS, KILEY and CUMMINGS, Circuit Judges.

PER CURIAM.

After a jury trial, defendant was found guilty of four narcotic offenses under Section 4705(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 4705 (a)), and Section 174 of Title 21, United States Code, and given a 12-year prison sentence. During the critical periods involved, the

Government's informer, James Hartley, wore a miniature radio transmitter. Over defendant's objection, Narcotics Agent Anthony Pohl related a conversation between Hartley and the defendant that Pohl picked up on his radio receiver.[1]

In this conversation, Hartley told defendant he wanted to get some "girl," meaning cocaine. Defendant replied: "I only got four [packages] left. I will let you have them for $30. Do you have the money?"

[1] For the reasons given in United States v. White, 405 F.2d 838 (7th Cir. 1969), the receipt in evidence of this and other electronically overheard incriminating conversations violated defendant's Fourth Amendment rights. We cannot say that defendant would have been convicted absent the narration of these conversations. Therefore, the case must be remanded for a new trial at which such overheard conversations must be excluded.

[2, 3] Defendant argues that reversal is also required by the trial court's refusal to give the following instruction on missing witnesses, referring to informer Hartley:

> "If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness creates the presumption that his testimony would be unfavorable to such party. However, no such presumption should be drawn by the jury where the witness is equally available to both parties, or where the witness's testimony would be merely cumulative."

The record shows that informer Hartley was present during the trial and indicated his willingness to take the stand

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[1] The record also reveals that Agent David Canaday testified to conversations transmitted over a concealed radio transmitter and the same objection was made by defendant.

if called by the defendant, although refusing to indicate what his testimony would be in advance. The Government may have felt that the testimony of Agents Pohl and Canaday rendered any testimony which the informer might offer merely cumulative. Obviously the defense failed to call Hartley because it feared that he might give testimony harmful to the defendant. Moreover, defendant's counsel commented to the jury during final argument concerning the Government's failure to call Hartley. Cf. United States v. Jackson, 257 F.2d 41, 43-44 (3d Cir. 1958).

On this record we do not find that the informer was so peculiarly within the power of the Government to call as to require the giving of the requested instruction. See Richards v. United States, 107 U.S.App.D.C. 197, 275 F.2d 655, 658 (1960), certiorari denied, 363 U.S. 815, 80 S.Ct. 1253, 4 L.Ed.2d 1155. In any event, in light of our holding that the Government may not, by way of electronic eavesdropping devices, substitute the testimony of the Agents for that of the informer (see Lopez v. United States, 373 U.S. 427, 441-446, 83 S.Ct. 1381, 10 L.Ed.2d 462 (Warren, C.J., concurring)), the Government may decide that Hartley's testimony is necessary to introduce at a new trial in this case. Nor did the trial court abuse its discretion in permitting Agent Pohl to give rebuttal testimony despite his earlier presence in the courtroom. See, e. g., Powell v. United States, 208 F.2d 618 (6th Cir. 1953). This testimony concerned the license number and registration of a car supposedly driven by defendant while he claimed to be elsewhere and was based on Pohl's notes rather than on what he heard during the trial.

Reversed and remanded.[2]

[2] Issuance of mandate being withheld pending Supreme Court's decision in United States v. White, No. 46 October Term, 1969.

HASTINGS, Circuit Judge (concurring).

I concur in the result reached by the majority in this case, on the authority of United States v. White, 7 Cir., 405 F.2d 838 (1969). I recognize the en banc majority determination of *White* as a controlling precedent in this circuit at this time, although I adhere to my views expressed in the dissent in *White*.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 8, 1971.

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16426 vs.

SILAS WALLER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This matter comes before the Court on the motion of plaintiff-appellee, United States of America, for entry of an order vacating the judgment of this Court heretofore entered on January 31, 1969, reversing and remanding the conviction herein and for entry of an order affirming the conviction of defendant-appellant, Silas Waller. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of this Court heretofore entered on January 31, 1969 be vacated and that the judgment of the United States District Court for the Northern District of Illinois Eastern Division, entered in this cause and appealed from be, and the same is hereby AFFIRMED, on the motion of plaintiff-appellee.

APPENDIX "C"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16426. vs.

SILAS WALLER,

Defendant-Appellant.

ORDER

On consideration of the defendant's motion to vacate or for rehearing *en banc*, the convictions under possession counts 2 and 4 were improper under *Turner* v. *United States*, 396 U.S. 398. Therefore, the judgments under those two counts are reversed and remanded with instructions to vacate the sentences thereunder.

Since no member of this Court in regular active service has requested that a vote be taken on the suggestion for an *en banc* rehearing, the same is hereby denied.